

ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL  
MAYOR



CHARLES W. TOTTO  
EXECUTIVE DIRECTOR & LEGAL COUNSEL

**AGENDA**

Honolulu Ethics Commission  
**July 23, 2015 – 11:30 am**  
Standard Financial Plaza  
Conference Room, Suite 211  
715 South King Street  
Honolulu, Hawaii 96813

**SPEAKER REGISTRATION**

- Prior to the Day of the Meeting: Persons wishing to testify are requested to register their name, phone number and agenda item subject matter via email at [ethics@honolulu.gov](mailto:ethics@honolulu.gov); or calling 768-7787 or 768-7791.
- On the Day of the Meeting: Persons who have not registered to testify by the time the Commission meeting begins will be given the opportunity to speak on an item following the oral testimonies of the registered speakers.
- Each speaker is limited to three minute presentations on each item.

**WRITTEN TESTIMONY**

- Prior to the Day of the Meeting: Testimony may be emailed to [ethics@honolulu.gov](mailto:ethics@honolulu.gov) or faxed to 768-7768.
- On the Day of the Meeting: 10 copies are requested if written testimony is submitted on-site.

**ORDER OF BUSINESS**

- I. CALL TO ORDER
- II. OLD BUSINESS

- A. Confirming the Date and Time for the August 19, September 23, and October 21, 2015 Meetings; and Setting the Meeting Date During the Week of November 16 - 19, 2015.

### III. NEW BUSINESS

- A. For Action: Request for a Motion to Rescind the Media Policy Adopted at the June 24, 2015 Meeting.
- B. For Action: Request for a Motion to Adopt a New Draft Media Policy.
- C. For Discussion: Performance Evaluation of the Executive Director and Legal Counsel.

The Commission reserves the right to go into executive session pursuant to Section 92-5(a)(2), Hawaii Revised Statutes (HRS), to consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of the matters affecting privacy will be involved.

- D. For Action: Request for a Motion to Approve and Adopt Staff's Recommended Charter Amendment Regarding Setting Salaries for the Ethics Commission Attorneys and to Submit the Amendment to the Charter Commission.

### IV. EXECUTIVE SESSION (The following agenda items will be reviewed in executive session pursuant to Section 92-5(a)(2), Hawaii Revised Statutes (HRS), to consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of the matters affecting privacy will be involved; HRS Section 92-5(a)(4), to consult with the Commission's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities; or HRS Section 92-5(a)(8) to deliberate or make a decision upon a matter that requires consideration of information that must be kept confidential pursuant to state or federal law or court order.)

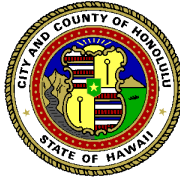
- A. For Action: Request for a Motion to Find Probable Cause of Violations of ROH Sec. 3-8.4 (Failure to File Complete Financial Disclosures) by a City Officer. (HRS Secs. 92-5(a)(2), (a)(4) and (a)(8))
- B. For Action: Request for a Motion to Find Probable Cause of Violations of ROH Sec. 3-8.4 (Failure to File Complete Financial Disclosures) by a City Officer. (HRS Secs. 92-5(a)(2), (a)(4) and (a)(8))

### V. ADJOURNMENT

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL  
MAYOR



CHARLES W. TOTTO  
EXECUTIVE DIRECTOR & LEGAL COUNSEL

July 17, 2015

TO: CHAIR KATY CHEN, VICE CHAIR MICHAEL LILLY AND  
MEMBERS OF THE ETHICS COMMISSION

FROM: CHARLES W. TOTTO, EXECUTIVE DIRECTOR AND LEGAL COUNSEL,  
AND LAURIE A. WONG, ASSOCIATE LEGAL COUNSEL

SUBJECT: AGENDA ITEMS FOR THE JULY 23, 2015 MEETING, **OPEN SESSION**

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I. CALL TO ORDER

II. OLD BUSINESS

- A. Confirming the Date and Time for the August 19, September 23, and October 21, 2015 Meetings; and Setting the Meeting Date During the Week of November 16-20, 2015.

III. NEW BUSINESS

- A. **For Action: Request for a Motion to Rescind the Media Policy Adopted at the June 24, 2015 Meeting.**

This item was requested to be on the agenda by Chair Chen, Vice Chair Lilly and Commissioners Silva and Yuen. A copy of the Media Policy adopted at the June 24 meeting is attached as **OPEN - 1**. Staff's comments on this Policy from the June 24 meeting packet are attached as **OPEN - 2**.

The staff requested media policies and practices from 17 other jurisdictions. 11 responded. In the following jurisdictions, there is no media policy and the executive directors are expected to respond media questions: the states of Hawaii, New York and Louisiana and the municipalities of New York City, Chicago, Seattle, San Diego and Denver. The media policy for the ethics boards in Miami-Dade and Jackson Counties (Florida) require media inquiries to be answered by the executive director. The

Minneapolis ethics agency is covered by the same media policy applicable to all city administrative agencies.

**B. For Action: Request for Motion to Adopt a New Media Policy.**

This item was requested for the agenda by Vice Chair Lilly and Commissioner Amano.

The July 23, 2015 Draft Media Policy (“July Draft”) was drafted by Vice Chair Lilly and is attached as **OPEN - 3**. This is a “redline-strikeout” version. In other words, the portions of the June 24 Policy that he recommends deleted are lined out, with the new wording underlined.

If the Commission believes that a media policy is needed, staff recommends the adoption of the July Draft, with the exception of para. 4 which should be deleted.

The July Draft removes the prohibition against “air[ing] concerns/grievances regarding operations of the Ethics Commission” (June 24 Policy at para. 2). This restriction was impractical because discussion about improvements to the Commission operations could be interpreted as a “concern/grievance” about the current status. Also, anyone, *except* the Commission, could comment on such issues. In addition, the changes in para. 2 clarify that the Commission may inform the media about how an opinion or finding would affect future situations. This is similar to what staff does in rendering informal ethics advice.

Para. 3 of the July Draft requires the Executive Director/Legal Counsel (EDLC) to inform the EC members of the content of comments made to the media. This should ensure that the commission members are apprised of Commission information before the media outlets run their articles. If a commissioner believes that the EDLC has not properly responded to the media, he or she can bring it to the attention of the EDLC and the Commission.

As to para. 4, staff believes that the process to have Commissioner officers monitor and vet the EDLC’s responses to the media remains inefficient and subject to varying interpretations. Para 4 of the June 24 Policy and the July Draft are identical and read: “Where media statements are required immediately, the EDLC will respond after consultation with the Ethics Commission Chair or, if the Chair is not readily available, the Vice Chair, or if neither the Chair or Vice Chair is readily available, the Chair of Vice-Chair’s Commissioner-designee.”

Since the adoption of the June 24 Policy, the EDLC has been asked six questions by the media. Under the traditional process these would take about 10 minutes on average to respond to, a total of 60 minutes. Because the new process requires that his response be monitored or vetted by EC officers, the time involved has at least tripled because of emails going back and forth, phone discussions and work interruptions. If we annualize number of media inquiries, there will be about 100 media inquiries this year. The new process will require 30 minutes time for each of 100 requests or 50 hours of response time. The traditional media practice would require only 17 hours. There will be a significant loss of our very limited resources under para. 4.

Besides the inefficiency, responses will likely be inconsistent responses because over time different EC members will have to be consulted. Some members may allow the EDLC wide latitude to

respond, others may restrict the response to wording they believe best suits their understanding of the issue asked. There are no guidelines for how the EC members will review or instruct the EDLC's responses.

**C. For Action: Performance Evaluation of the Executive Director and Legal Counsel.**

This matter was deferred from the June 24 meeting.

Because this is a matter dealing with the evaluation of an employee's work performance, the matter must be heard in executive session, pursuant to HRS Sec. 92-5(a)(2), unless waived by the EDLC.

**D. For Action: Request for a Motion to Approve and Adopt Staff's Recommended Charter Amendment Regarding Setting Salaries for Ethics Commission Attorneys and to Submit the Amendment to the Charter Commission.**

This matter was deferred from the June 24 meeting. The Permitted Interaction Group had requested that this matter be on the agenda.

The Charter Commission's current schedule is to receive all potential Charter amendments by October 2015. The Administration may have an earlier deadline for amendments that it would like to package together.

Please see the attached Confidential Attorney-Client Privileged memorandum dated July 17, 2015, **OPEN – 4**. If Commission members would like to discuss the legal issues, as opposed to the policy or practical issues in the memorandum, a motion to go into executive session to seek the advice of EC counsel is required. Also, by vote of the majority of total members the Commission may waive the attorney-client privilege and make the memorandum public and discuss all issues in the open session meeting.

Should you have any questions or comments, please contact Laurie or me.

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**June 24**  
**Honolulu Ethics Commission**  
**Media Policy**

**Policy**

In accordance with the Revised Charter and the Revised Ordinances of Honolulu, the Ethics Commission acknowledges that it has a responsibility to improve and maintain public confidence in government officials and employees. In order for the Ethics Commission to effectively carry out its responsibilities, its use of print and electronic media will be in both a proactive and reactive manner.

**Procedure**

As such, the following outlines a clear way in which the Ethics Commission can achieve its stated aims through media interaction:

1. All media releases will aim to educate and inform the public about the standards of conduct governing the work of City officers and employees for the public.
2. Under no circumstances shall any media communication engage in media activities to air concerns/grievances regarding the operations of the Ethics Commission, or interpret or comment on any decisions or advisory opinions.
3. All media enquiries are to be directed to the Executive Director/Legal Counsel ("EDLC"). The EDLC will respond in the normal course; for instance, the EDLC will work with Staff on the response and consult with the Ethics Commission, if time permits.
4. Where media statements are required immediately, the EDLC will respond after consultation with the Ethics Commission Chair or, if the Chair is not readily available, the Vice-Chair or, if neither the Chair nor Vice-Chair is readily available, the Chair or Vice-Chair's Commissioner-designee.
5. To avoid confusion and potentially contradictory information, Ethics Commissioners and/or Staff shall not communicate with media on behalf of the Ethics Commission without prior written authorization from the EDLC.
6. All written media communications shall be sent to the following, in order:
  - Commission members
  - Complainant(s) and respondent(s), if applicable
  - City Administration (mayor, managing director, cabinet)
  - Councilmembers
  - Media
  - Members of the public who have asked to receive Commission news releases
  - Departmental administrative service officers
  - Any other Requestor

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July 23

## Honolulu Ethics Commission Media Policy

### Policy

In accordance with the Revised Charter and the Revised Ordinances of Honolulu, the Ethics Commission acknowledges that it has a responsibility to improve and maintain public confidence in government officials and employees. In order for the Ethics Commission to effectively carry out its responsibilities, its use of print and electronic media will be in both a proactive and reactive manner. One of the primary roles of the Honolulu Ethics Commission is to maintain and improve public confidence in government officials and employees. One of the ways in which it fulfills that role is by communicating with the public through the news media. The purpose of a news release from the Commission is to summarize and communicate to the public the important positions or actions taken by the Commission, as well as their impact on the public and the integrity of city government and city officials.

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### Procedure

The following procedures will be followed as reasonably practicable:  
As such, the following outlines a clear way in which the Ethics Commission can achieve its stated aims through media interaction:

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1. All media releases will aim to educate and inform the public about the standards of conduct governing the work of City officers and employees for the public. Media interaction will aim to educate and inform the public and city workforce about the City ethics program, including the standards of conduct governing the work of City officers and employees, ethics training, legislation, statistics and Commission priorities.

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2. Under no circumstances shall any media communication engage in media activities to air concerns/grievances regarding the operations of the Ethics Commission, or interpret or comment on any decisions or advisory opinions. In news releases about formal advisory opinions and findings, staff should refrain from interpreting the opinions and findings. However, it is permissible to extrapolate from advisory opinions or findings of the Commission to comment on how those opinions or findings may affect future hypothetical situations.

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3. All media enquiries are to be directed to the Executive Director/Legal Counsel ("EDLC"). The EDLC will respond in the normal course; for instance, the EDLC will work with Staff on the response and consult with the Ethics Commission, if time permits.

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All media enquiries should be directed to the Executive Director/Legal Counsel ("EDLC"). The EDLC will respond in the normal course. At the earliest reasonable

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opportunity, the EDLC will inform the Commission members by email of the content of comments made to the media. To avoid confusion and potentially contradictory information, Commission members and staff should not communicate with media on behalf of the Commission. However, Commission members and staff are permitted to comment publicly in their individual capacities.

4. Where media statements are required immediately, the EDLC will respond after consultation with the Ethics Commission Chair or, if the Chair is not readily available, the Vice-Chair or, if neither the Chair nor Vice-Chair is readily available, the Chair or Vice-Chair's Commissioner-designee.

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~~5. To avoid confusion and potentially contradictory information, Ethics Commissioners and/or Staff shall not communicate with media on behalf of the Ethics Commission without prior written authorization from the EDLC. Comments in a news release shall be attributed to either the Commission or the Commission staff, as consistent with the statement being reported.~~

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6. All written media communications shall be sent to the following, in order:

- Commission members
- Complainant(s) and respondent(s), if applicable
- City Administration (mayor, managing director, cabinet)
- Councilmembers
- Media
- Members of the public who have asked to receive Commission news releases
- Departmental administrative service officers
- Any other Requestor

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7. The Commission's policy on responding to on-camera interviews by the EDLC or Assistant EDLC is:

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**OPEN – 3**

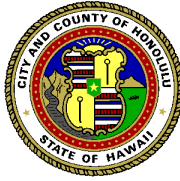
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ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL  
MAYOR



CHARLES W. TOTTO  
EXECUTIVE DIRECTOR & LEGAL COUNSEL

June 19, 2015

TO: CHAIR KATY CHEN, VICE CHAIR MICHAEL LILLY AND  
MEMBERS OF THE ETHICS COMMISSION

FROM: CHARLES W. TOTTO, EXECUTIVE DIRECTOR AND LEGAL COUNSEL,  
AND LAURIE A. WONG, ASSOCIATE LEGAL COUNSEL

SUBJECT: AGENDA ITEMS FOR THE JUNE 24, 2015 MEETING, **OPEN SESSION**

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**For Action: Setting a Media Policy.**

At the last meeting, the EC asked staff to draft another proposal based on the media policy offered by Commissioner Amano, **OPEN - 6**, and staff's draft news release, **OPEN - 7**. Staff assumes that a goal of the EC is to continue educating and responding to media inquiries to inform the public about what the Commission does and the conduct of city officials. Staff also assumes that the Commission believes that it should be as transparent in carrying out its work, except where due process rights or confidentiality would be infringed. If staff has misinterpreted the Commission philosophy, that should be discussed.

Staff believes that any media policy, as well as any other policy or procedure adopted by the Commission, should be based on the following basic principles:

**1. There should be clear reasons to set the policy.**

What are the current problems that the policy will resolve or avoid? It is not clear how the Commission's past practice as reflected in staff's draft has resulted in miscommunication to the media or public or misstatements of the Commission's positions. Without knowing what the concerns are, it is not possible to craft a policy that corrects the problems. Given the other pressing Commission priorities, the EC should adopt the approach that "If it ain't broke, don't fix it."

For at least the last 30 years, best government agency practice has been for agencies to disseminate what they do for the public and how their actions' impact the public. The only practical means of doing so is through media coverage. The Commission's practice for 15 years has been to

accurately inform and respond to media inquiries because the media is the most effective and ubiquitous link to public. Of course, certain topics are not open to the media, such as pending complaint cases, EC deliberations or confidential information.

The media report on EC matters of public interest that are discussed in open session or in formal advisory opinions. For example, in fall of 2013, the Commission debated the role of COR in setting the EC's budget because of the impact of budget and personnel control on the ability of the EC to independently and effectively manage its workload. Reporters attended the open session of a number of meetings and composed news articles based on the topics discussed. The media and members of the public believed that this was an important issue for public review.

## **2. The policy should not restrict staff's ability to efficiently, promptly and accurately respond to media inquiries.**

Having the EDLC contact the EC members to get approval on responses to the media will be counterproductive to the goals of ethics education and transparency. The suggestion that there be some type of approval by the Commission before responding to a media inquiry raises complications:

- Having proposed responses approved by the EC as a whole or by a member is too cumbersome to ensure prompt, accurate responses. The answer to one question will create follow-up questions. It would be unwieldy to have to ask for EC or commissioner permission for each conversation or follow-up question. Also, what happens if the responsible Commission member does not agree with staff's proposed response?
- Using a non-specific triggering event such as "if time permits" makes it difficult to decide whether a response waits until the next Commission meeting or is approved by the responsible EC member. Also, who is to determine "if time permits"?
- If the EC is unable to promptly and professionally respond to media inquiries, the media will get its information from other sources and the EC will lose the opportunity for timely input into the discussion.

A simpler approach can be adopted to ensure that members know what staff discussed with reporters before it is reported in the media. The Media Policy below requires the EDLC to respond to the media inquiry and then copy the members with an email so that they are informed of the advice given or conversation.

## **3. The consequences of the policy should be vetted before adoption.**

Staff is concerned that the current wording of para. 2 in **OPEN- 6** would result in unintended, but serious, consequences. The paragraph reads: "Under no circumstances shall any media communication engage in media activities to air concerns/grievances regarding the operations of the Ethics Commission, or interpret or comment on any decisions or advisory opinions."

This paragraph has two parts. First it prohibits staff and or EC members from raising "concerns" or "grievances" about EC operations through the media. No explanation of the need for this restriction

has been offered yet. Even if the prohibition is justified, it is impractical to implement and follow. There is no definition of “concerns” or “grievances.” Something as ordinary as the workload statistical chart staff handed out at the last meeting might reasonably be interpreted as a concern or grievance about not having enough resources to do our job. Would the Commission want to hamstring itself by prohibiting any response to a reporter asking whether the chart shows we need more resources? What about a Charter amendment to change how EC lawyers’ salaries are set -- does that imply a concern or grievance about the manner in which salaries have been determined in the past?

Take a more serious example. What if the Council or Administration cuts the Commission’s budget by 25% (a scenario that has happened in other jurisdictions)? No comment could be made by the Commission. The result of a “no comment” policy on EC operations is that anyone, except the EC, may discuss operational issues in the media.

The second part of the prohibition is that no comment may be made to “interpret or comment on any advisory opinions.” Staff assumes that this prohibition does not restrict the staff’s duty to interpret the EC’s formal advisory opinions when rendering informal advice or examining complaints under Rule 1.10(a), Ethics Commission Rules of Procedure.<sup>1</sup> If staff’s assumption is incorrect, the issue should be discussed.

A typical media request to staff is: “How will the Garcia opinion affect other city personnel in the future?” The typical staff response is: “Each case presents different facts, but generally this case shows that city officials may not accept gifts over \$200 in value from one source in one year where that source has an interest that the official could affect.” To effectively communicate to the public, city work force and the media, staff needs to be able to interpret the practical effect that a formal advisory opinion will likely have on similar ethics issues in the future. Staff does so hundreds of times a year when it responds to requests for advice. What staff should not and does not comment on is the EC’s deliberations in reaching an opinion.

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<sup>1</sup> 1.10 Advisory Opinions

a. Informal Advisory Opinions

The legal counsel may provide informal advisory opinions at the direction of the commission or when the opinion is on a matter which is established by precedent or is clear under the applicable provisions of the law and the legal counsel determines that it is not likely that the commission would render a different opinion. Legal counsel shall submit the request to the commission in the following circumstances:

- (1) The case raises an important legal or policy issue on which the Commission has not taken a position in a formal advisory opinion or guideline;
- (2) An opinion in the case is likely to set new precedent;
- (3) The requester asks for a formal advisory opinion from the Commission; or
- (4) There are other unique aspects to the case of which the Commission should be made aware, including that the request concerns an elected official. (Emphasis added.)

With these 3 basic principles in mind – cogent reasons supporting the policy, maintaining efficient and accurate responses and vetted consequences -- staff has redrafted the media policy below. (The comments in italics are intended as explanations and would not be included in the policy.)

**DRAFT**  
**Honolulu Ethics Commission**  
**Media Policy**

**Policy**

The Honolulu Ethics Commission (Commission) acknowledges its role in the City government's responsibility to maintain and improve public confidence in government officials and employees. To that end, the Commission intends to communicate with the public and City officers and employees by all available means, including through the media.

*Comment: Under RCH Sec. 11-101, all City officers and employees are responsible to demonstrate the "highest standards of ethical conduct." The has a role in the process, but is not solely responsible for the level of public confidence in City government.*

**Procedures**

The Commission adopts the following procedures for media interaction:

1. Media interaction will aim to educate and inform the public and city workforce about the City ethics program, including the standards of conduct governing the work of City officers and employees, ethics training, legislation, statistics and Commission priorities.

*Comment: The draft broadens the issues that may be discussed through the media.*

2. All media enquiries should be directed to the Executive Director/Legal Counsel ("EDLC"). The EDLC will respond in the normal course. At the earliest reasonable opportunity, the EDLC will inform the Commission members by email of the content of comments made to the media.

*Comment: This replaces paragraph 2, which read: "Under no circumstances shall any media communication engage in media activities to air concerns/grievances regarding the operations of the Ethics Commission, or interpret or comment on any decisions or advisory opinions." The reasons for deleting para. 2 include:*

- *It restricts the Commission and staff from commenting on important public issues such as budgeting and personnel, while no one else would be prohibited.*
- *It prohibits the staff from using formal advisory opinions as precedent in responding to the impact of the opinion on similar cases.*

*The requirement to inform the EC members of the media communications is intended to allay concerns about being informed of an EC media exchange through the media rather than from staff.*

3. To avoid confusion and potentially contradictory information, Commission members and staff should not communicate with media on behalf of the Commission.

4. All written news releases shall be sent to the following, in order:

- Commission members;
- Complainant(s) and respondent(s), if applicable;
- City Administration (mayor, managing director, cabinet) and Councilmembers;
- Media;
- Members of the public who have asked to receive Commission news releases;
- Departmental administrative service officers;
- Any other requestor.

**4. Recommendation.**

For the reasons stated above, staff recommends adoption of the Draft Media Policy.

Should you have any questions or comments, please contact Laurie or me.